

ZACHERY DUFFY, No C-02-2250 VRW  
Plaintiff, ORDER  
v  
SAN FRANCISCO POLICE DEPARTMENT  
et al,  
Defendant.

FRCP 4(e) (1) provides that "service upon an individual \*  
\* \* may be effected \* \* \* pursuant to the law of the state in which

1 the district court is located." California law (like federal law,  
2 see FRCP 4(e)(2)) expresses a preference for personal service. But  
3 plaintiff did not personally serve the officers; instead, he relied  
4 on the provisions for substitute service found in Cal Code Civ Pro  
5 § 415.20(b) (erroneously cited as § 415.20(a) on the summonses):

6 If a copy of the summons and complaint cannot  
7 with reasonable diligence be personally  
8 delivered to the person to be served, as  
9 specified in Section 416.60, 416.70, 416.80, or  
10 416.90, a summons may be served by leaving a  
11 copy of the summons and complaint at the  
12 person's dwelling house, usual place of abode,  
13 usual place of business, or usual mailing  
14 address other than a United States Postal  
15 Service post office box, in the presence of a  
16 competent member of the household or a person  
17 apparently in charge of his or her office,  
18 place of business, or usual mailing address  
19 other than a United States Postal Service post  
20 office box, at least 18 years of age, who shall  
21 be informed of the contents thereof, and by  
22 thereafter mailing a copy of the summons and of  
23 the complaint by first-class mail, postage  
24 prepaid to the person to be served at the place  
25 where a copy of the summons and complaint were  
26 left. Service of a summons in this manner is  
27 deemed complete on the 10th day after the  
28 mailing.

18 There is no dispute that service was effected in the manner  
19 described above, but the officers argue that plaintiff did not use  
20 "reasonable diligence" in attempting to deliver the summons and  
21 complaint personally to the officers. It is plaintiff's burden to  
22 demonstrate "reasonable diligence." See Walker & Zanger (West  
23 Coast) Ltd v Stone Design SA, 4 F Supp 2d 931, 934 (C D Cal 1997)  
24 (citing Carimi v Royal Caribbean Cruise Line, Inc, 959 F2d 1344,  
25 1346 (5th Cir 1992)) ("Once the validity of service of process is  
26 contested, the plaintiff bears the burden of establishing its  
27 validity.").

28 How much diligence is "reasonable diligence"? California

1 cases instruct that never once attempting personal service is not  
2 reasonable diligence, see Burchett v City of Newport Beach, 33 Cal  
3 App 4th 1472, 1477 (1995), while making three or four unsuccessful  
4 attempts at personal service at a location where the defendant is  
5 likely to be found does constitute reasonable diligence, see Bein v  
6 Brechtel-Jochim Group, Inc, 6 Cal App 4th, 1387, 1391-92 (1992);  
7 Espindola v Nunez, 199 Cal App 3d 1389, 1392 (1988).

8           Despite this being the central issue presented by the  
9 officers' motion to dismiss, plaintiff's declarations do not speak  
10 with specificity to the efforts made at personal service.

11 Plaintiff's counsel, Stanley Hilton ("Hilton"), states that he was  
12 told over the telephone that process servers generally are not  
13 allowed to loiter at police stations waiting for officers. Hilton  
14 Decl (Doc #54) ¶2. But this is merely research; it is not an  
15 attempt at service. Next, Hilton states that "in February and  
16 March 2005 I made efforts to serve the individual officers in this  
17 case." Id ¶3. But he does not state precisely when these attempts  
18 were made, where he went, how many times he went and which of the  
19 six officers he sought to serve. Finally, Hilton states that "in  
20 March 2005 I also made other diligent efforts to try to personally  
21 serve the individual police officers." Id ¶4. This statement is  
22 conclusory and discloses no facts about Hilton's attempts at  
23 service.

24           Moreover, Hilton's claim of efforts at personal service  
25 before mid-March is belied by the summons issuance history in this  
26 case: It was not until March 14, 2005 -- four days before the  
27 court-imposed service deadline -- that Hilton obtained summonses  
28 issued by the clerk. Newdorf Decl (Doc #51) Ex B (summonses). The

1 docket reflects that the March 14, 2005, summonses are the only  
2 ones issued by this court. Thus Hilton he did not even possess a  
3 summons to serve before March 14, 2005; he could not have made any  
4 true attempt at personal service before March 14. (No summons was  
5 issued originally in this case because it was removed from state  
6 court.)

7           Plaintiff also offers the declaration of Hilton's  
8 paralegal, James Chaffee. Chaffee describes going to the SFPD's  
9 legal division, Chaffee Decl (Doc #56) ¶5, and then going to each  
10 officer's duty station to leave a copy of the summons and  
11 complaint. While it appears that Chaffee effected proper  
12 substitute service, it does not appear that he ever attempted  
13 personal service.

14           In sum, the court finds no credible evidence that  
15 plaintiff exercised any diligence (let alone reasonable diligence)  
16 in attempting personal service before falling back on substitute  
17 service. To the contrary, it appears that plaintiff gave up on  
18 personal service rather easily. Locating and personally serving  
19 police officers may be difficult, but this does not excuse  
20 plaintiff from the diligence standard required by Cal Code Civ Pro  
21 § 415.20(b).

22           Plaintiff also argues that the officers should be  
23 estopped from raising a defense of insufficiency of service because  
24 the SFPD's legal division told Hilton and Chaffee that substitute  
25 service would be sufficient. Setting aside the foolhardiness of  
26 relying on one's adversary for legal advice, the estoppel argument  
27 fails on the merits: The statements of one entity (the SFPD's  
28 legal division) cannot estop another (the officers, sued in their

1 individual capacities), nor is it reasonable to rely on an  
2 employer's representation about what rights its employee will or  
3 will not insist upon when sued in an individual capacity.

4           Moreover, plaintiff was on notice that substitute service  
5 was contrary to standard SFPD procedure. In a June 22, 2004,  
6 filing in connection with SFPD's motion to dismiss, the officer in  
7 charge of the SFPD legal division stated that "General Order 3.14  
8 authorizes the Legal Division to accept service of summons and  
9 complaint on behalf of [SFPD]. It does not authorize the Legal  
10 Division to accept service on behalf of individual police officers.  
11 Under this order, individual officers 'are entitled to be  
12 personally served with a Summons and Complaint.'" Keohane Decl  
13 (Doc #31) ¶¶3-4 (citation omitted). The pertinent regulation was  
14 attached to the declaration. See id Ex A. Thus plaintiff was on  
15 notice that, even for police officers, substitute service was  
16 appropriate only after a reasonably diligent effort at personal  
17 service was unsuccessful.

18           Finally, even if plaintiff had exercised the reasonable  
19 diligence required by California law, the court would still dismiss  
20 the case against the officers for a reason not even mentioned by  
21 the parties: In its order of February 25, 2005, the court extended  
22 the time for service under FRCP 4(m) through and including March  
23 18, 2005. Doc #42. Summonses were left for the officers and  
24 mailed to them on March 14, 2005, but Cal Code Civ Pro § 415.20(b)  
25 provides that such substitute service "is deemed complete on the  
26 10th day after the mailing" of the additional copy of the summons  
27 and complaint. Consequently, service was not complete until after  
28 March 18, 2004; even if service was sufficient under Rule 4(e), it

1 was not timely under Rule 4(m). Rule 4(m) provides that in such a  
2 situation, "the court, upon \* \* \* its own initiative after notice  
3 to the plaintiff, shall dismiss the action without prejudice."  
4 Plaintiff was put on notice by the court's February 25, 2005, order  
5 of the service deadline and the consequences for not meeting it.  
6 Accordingly, a dismissal without prejudice is appropriate under  
7 FRCP 4(m) as well as under FRCP 12(b)(5).

8 \* \* \*

9 In sum, the officers' motion to dismiss (Doc #50) is  
10 GRANTED. The officers are DISMISSED without prejudice. The  
11 hearing set for May 26, 2005, is VACATED. See Civ L R 7-1(b). The  
12 parties shall appear for a case management conference on May 31,  
13 2005, at 9:00 am to discuss a further discovery plan.

14  
15 IT IS SO ORDERED.

16  
17 \_\_\_\_\_/s/

18 VAUGHN R WALKER

19 United States District Chief Judge  
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